EME COURT, U. S.

No. 656

OCT 14 1968

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

ROSCOE L. NORMAN, ET AL.,
Petitioners,

v.

THE UNITED STATES,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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WILSON - EPES PRINTING CO. - RE 7-6002 - WASHINGTON, D. C. 20001

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Petitioners, Roscoe L. Norman, John E. Crowley, Sherwood E. Buckland, Maurice J. Fitzgerald, Loran E. Buckey, and John B. Martin, plaintiffs in the court below, pray that a writ of certiorari issue to review the judgment of the United States Court of Claims, filed March 15, 1968, which became final on July 17, 1968, upon the denial of plaintiffs' motion for a new trial and reassignment of their cases to a different judge of said Court of Claims.

PROCEEDINGS AND OPINION BELOW

The six cases involved herein were filed separately, were consolidated for hearing by a Commissioner of the Court below on his own motion, and were heard by him at Washington, District of Columbia, on January 19, 20 and 21, 1966. The Commissioner filed a report on Febru-

ary 2, 1967, containing a "Memorandum Opinion", findings of fact and a recommended conclusion of law. On June 5, 1967, the six plaintiffs, by counsel, filed exceptions and objections to the Commissioner's Report and a 48 page brief in support thereof. Government counsel filed a brief in opposition on August 9, 1967.

The cases were argued before the Court of Claims on December 6, 1967, and on March 15, 1968, the Court filed a 48 page opinion containing a so-called "Conclusion of Law" "that plaintiffs are not entitled to recover" and "their petitions are dismissed."

On May 16, 1968, plaintiffs filed a motion for a new trial and reassignment of their cases to a different judge of the Court of Claims. On July 17, 1968, the Court of Claims denied that motion.

JURISDICTION

The jurisdiction of this Court is invoked under the provisions of Title 28, United States Code, Section 1255(1).

QUESTIONS PRESENTED

The questions to be decided are new, arise under a new and unusual statute not previously construed by any court, and are as follows:

1. Unconstitutionality of Section 10 of the Act of July 12, 1960, Public Law 86-616, 74 Stat. 395, a temporary statute, commonly referred to as the "White Charger Act", for failure of the Congress to provide standards for the exercise of Congressional discretion conferred on the Secretary of the Air Force only; denial to plaintiffs of their constitutional rights of due process of law, including a hearing, confrontation, cross-examination, and representation by counsel; and because enactment thereof was procured by the United States Air Force by misrepresentations made to the Congress.

2. The decision by the United States Court of Claims of a federal question of substance not previously determined by this Court.

3. The decision by the United States Court of Claims of an important question of federal law which should be settled by this Court.

4. The decision by the United States Court of Claims in these cases so far departs from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's powers of supervision.

5. Whether Section 10 of the Act of July 12, 1960, a temporary statute, has the effect of suspending or temporarily repealing Sections 8916 and 8921 of Title 10, United States Code, permanent statutory provisions, vesting in plaintiffs the right to remain on active duty for 28 years as lieutenant colonels and 30 years as colonels in the regular United States Air Force.

(For the convenience of this Court, the statutes mentioned in this paragraph and the opinion of the Court below are printed in the appendix hereto)

6. The unlawful delegation by the Secretary of the Air Force of Congressional discretion conferred on him only by said Section 10 of the Act of July 12, 1960, thus rendering the premature mandatory retirement of plaintiffs void and ineffectual.

The foregoing questions are discussed in the following pages of this petition.

STATUTES INVOLVED

Section 10 of the Act of July 12, 1960, Public Law 86-616, 74 Stat. 395.
Section 8916 of Title 10, United States Code
Section 8921 of Title 10, United States Code
Section 8963 of Title 10, United States Code

STATEMENT OF THE CASES

The six plaintiffs involved herein were lieutenant colonels and colonels in the Regular United States Air Force who accepted their appointments with the intention of making service in the Air Force their careers and of remaining on duty until they became entitled to retirement for length of service. By statutes in force at that time the terms of office of lieutenant colonels and colonels were 28 and 30 years respectively. Plaintiffs served honorably, faithfully and to the entire satisfaction of their superior officers for more than 20 years, but were retired mandatorily under Section 10 of the Act of July 12, 1960, the enactment of which, as hereinafter shown, was procured by misrepresentations and misstatements made to the Congress by the Air Force. Plaintiffs' premature forced retirements resulted in materially reduced incomes at a time when maximum incomes were necessary for the support of their families, education of their children, and discharge of other necessary financial obligations.

REASONS FOR GRANTING THE WRIT

1. The statute involved (Sec. 10, Act of July 12, 1960) is unconstitutional and should have been so found by the Court of Claims.

2. The questions to be decided are new and arose under a new and unusual temporary statute not previously construed by any court; namely, Section 10 of the Act of July 12, 1960.

3. The Court of Claims has decided federal questions of substance not theretofore determined by this Court, but which should be settled by this Court.

4. The decision below constitutes such a departure from the usual course of judicial proceedings as to call for the exercise of the powers of supervision of this Court.

5. Even if the statute should be found to be constitutional, the Secretary of the United States Air Force unlawfully attempted to delegate Congressional discretion conferred only upon him without authority from the Congress therefor.

1. The White Charger Statute is Unconstitutional.

Section 10 of the Act of July 12, 1960, is unconstitutional and void because (1) it attempted to confer on the Secretary of the Air Force the legislative discretion to reduce the strength of the Air Force by the retirement mandatorily of permanently commissioned officers of the Regular Air Force before completion of their statutory tenures of office without prescribing any standards or methods of selecting such officers and without affording them any of the usual constitutional rights of a hearing, confrontation, cross-examination or representation by counsel. Under the terms of the statute as enacted, the Secretary of the Air Force could retire mandatorily the youngest, the oldest, the tallest, the shortest, the thinnest or heaviest officers, or all graduates of a particular college, or those with blue eyes, who had served at least 20 years and had been passed over for promotion more than twice.

Legislative standards for the exercise of delegated legislative discretion are essential to the validity of such a statute.

Panama Refining Co. v. Ryan, 293 U. S. 388, 55 S. Ct. 241, 72 L. Ed. 446 (1935)
Schechter Poultry Corp. v. U. S., 295 U. S. 495, 55 S. Ct. 837, 79 L. Ed. 1570 (1935)
State Board of Milk Control v. Newark Milk Co., 118 N. J. 504, 521, 522; 179 A. 116, 125 (1935)
Veix v. Seneca Bldg. & Loan Assoc., 126 N. J. L. 314, 321, 19 A. 2d 215 (1941)
State v. Traffic Telephone Workers Federation, 66 A. 2d 616 (N. J. Sup. Ct. 1949)

2. New Statute and New Questions Involved.

Section 10 of the Act of July 12, 1960 (74 Stat. 395), a temporary statute, constitutes a radical legislative departure from usual statutory provisions of a somewhat similar nature, because it purported to vest in the Secretary of the Air Force the temporary authority and power summarily to retire commissioned officers of the Regular United States Air Force of the ranks of lieutenant colonel and colonel as being marginal, marginally effective, unsatisfactory or substandard before they had served their terms of office fixed by permanent statutes without affording such officers the requisite constitutional rights of a hearing, confrontation and cross-examination.

By Sections 8916 and 8921 of Title 10, United States Code, lieutenant colonels and colonels were required to serve at least 28 and 30 years, respectively, before becoming entitled to retirement for length of service. In other words, their statutory terms of office were 28 and 30 years. Plaintiffs were summarily and mandatorily retired at reduced retirement pay before completion of their terms of office.

3. Federal Questions of Substance Are Involved.

Plaintiffs maintain that they had vested rights in their offices of which they could be deprived only by due process of law. Where an officer's tenure of office is fixed by statute, as here, before he can be deprived of his office against his will, he is entitled to a hearing, to be represented by counsel, to be confronted by his accusers, and to cross-examine them, as well as to exercise the right to challenge members of the hearing agency or court. Plaintiffs were denied all such rights.

Confrontation and cross-examination are "vital when one's employment rights are involved".

Greene v. McElroy, 360 U. S. 474, 496 (1959)
Beard v. Stahr, 370 U. S. 41, 43 (dissenting opinion) (1962)

Williams v. Zuckert, 371 U. S. 531, 534, cert. granted on rehearing 372 U. S. 765 (1963)
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Barber v. Page, 390 U. S. 719, 88 S. Ct. 1318 (1968)
Barber v. Gladden, 385 U. S. 363, 364 (1966)
Fletcher v. U.S.Ct. Cls. No. 386-65, decided March 15, 1968

The right of confrontation is "one of the fundamentals of life and liberty".

Kirby v. U. S., 174 U. S. 47, 55, 56 (1899)

Plaintiffs' interests in their employment were entitled to constitutional protection.

United Public Workers v. Mitchell, 330 U. S. 75 (1947)
Weiman v. Updegraff, 344 U. S. 183 (1952)
Slochower v. Board of Higher Education, 350 U. S. 551 (1956)

"Vested rights may be created by common law, by Statute, or by contract. No matter how created they are entitled to the same protection."

11 Am. Jur. 1200, Sec. 371, 16 Am. Jur. 2d 762, Sec. 422.

Plaintiffs' rights to remain on duty for 28 and 30 years were created by statute and plaintiffs could be deprived thereof only by due process of law. As stated above, they were denied due process of law.

Following the First World War, the Army was overstaffed with commissioned officers. Authority was requested of the Congress to reduce the commissioned strength of the Army. The Congress enacted the Act of June 4, 1920, 41 Stat. 758, 773, Sec. 246, which provided for placing Army officers in Classes A and B. Those in Class A were to be retained in the service, and those in Class

B were to be eliminated. In enacting that statute, Congress carefully safe-guarded the rights of such officers by authorizing them to show cause as to why they should not be eliminated from active service, to have a formal hearing before a Court of Inquiry, to appeal their cases to the Secretary of War and then to the President. We contend that the least that should have been granted to plaintiffs was a hearing, the rights of confrontation and cross-examination, and representation by counsel. Constitutional rights certainly are federal questions of substance, are involved in plaintiffs' cases, and this Court properly should settle those questions.

4. The Decision Below Departs From the Usual Course of Judicial Proceedings.

As we have shown above, plaintiffs were denied the constitutional rights of a hearing, confrontation and cross-examination before their mandatory premature retirements were effected.

Prior to during, and after 1958, the Department of the Air Force sought legislative authority for the elimination from the active list by mandatory retirement of a "small number" of "marginal", "marginally effective", "unsatisfactory" and "substandard" lieutenant colonels and colonels.

To procure enactment of such legislation, the Department of the Air Force represented to the Congress that it expected to eliminate about "a hundred (such officers) and then their problem will be solved"; "it is our hope to use this permissive legislation, if passed, very sparingly to eliminate only the very bottom in these grades"; "Therefore, in the interest of good personnel management, the Air Force would like the authority to involuntarily retire a certain few of these officers". "Based upon an examination of the records of the officers concerned, it is estimated that from 100 to 200 permanent lieutenant-colonels will be retired the first year." "In this grade

(colonel) the proposed law limits the number who may be involuntarily retired to 20 percent of those considered. This means that 40 would be the maximum number that could be eliminated in any particular year. Based on an examination of the records of these officers, it is estimated that approximately 25 would be retired the first year." "The primary purpose of this (legislation) is to give us a management tool to eliminate from the service marginally effective officers." "* * * we currently think we would probably eliminate 25 colonels." "* * * we have today approximately 600 permanent colonels serving in the active grade of colonel. "* * * if this legislation were passed we would involuntarily retire 25".

> (See Transcript of Hearing before a Subcommittee of the Committee on Armed Services, United States Senate, on S. 1795, June 17, 1959, Pages 16, 39, 40, 41, 42)

The evidence in the record before the Court of Claims and this Court conclusively and definitely shows that each of the plaintiffs was classified by superior officers under the Air Force's rating system as "A Very Fine Officer of Great Value to the Service", the rating category next to the highest used. None of the plaintiffs was classified or characterized as "marginal", "marginally effective", "substandard" or "unsatisfactory."

Instead of retiring 25 colonels and 100 to 200 lieutenant colonels the first year, the Air Force, less than seven months after passage of the White Charger statute, actually directed the retirement of 120 colonels and 375 lieutenant colonels, nearly five times the number of colonels and three times the number of lieutenant colonels which the Air Force represented to the Congress it wanted to retire. The Air Force deliberately misled the Congress into enactment of Section 10 of the Act of July 12, 1960. (Commissioner's Memorandum Opinion, pp. 19-20)

The court below failed to give any weight to the actions of the Air Force in procuring enactment of the White Charger statute by misrepresentations.

In the second paragraph on Page 2 of the opinion of the Court below, the following appears:

> "* * * The Act permitted early mandatory retirement of not to exceed 20 per cent of officers in the military service in the grade of permanent colonel and an unlimited number of permanent colonels with 20 years or more of service who had been considered for promotion twice, but not recommended."

Those statements are erroneous in several respects. The pertinent provisions of the so-called White Charger Act, (P.L. 86-616, 74 Stat. 395) are as follows:

> "(a) Not more than once in each fiscal year, the * * * Secretary of the Air Force may convene one or more boards, * * * to review the records of, and recommend for continuation on the active list, officers * * * in the regular grade of colonel or lieutenant colonel who have at least 20 years of service * * * and who have been considered more than twice but not recommended for promotion * * *.
>
> "(b) A board convened under this section shall recommend officers for continuation on the active list in the number specified by the Secretary. The Secretary may specify separate numbers for particular categories of officers. However, except with respect to the first board convened under this section * * * in the Air Force, the number specified by him for officers in any category must be at least 80 per cent of the officers in that category being considered. * * * (See pp. 5 and 6 of Court's opinion where pertinent provisions of the Act appear).

Accordingly, it is self-evident that the statements in the Court's opinion that the Act permitted early mandatory retirement of not to exceed 20 percent of officers in the grade of permanent colonel and an unlimited number

of permanent colonels with 20 years or more of service who had been considered for promotion twice are incorrect and inaccurate. The officers subject to mandatory retirement included both colonels and lieutenant colonels and was limited to such officers with at least 20 years of service who had been passed over for promotion three or more times. Furthermore, the limitation of 20 per cent applied to boards subsequent to the first board convened under the act. (Third sentence of Par. (b) of Sec. 10 of Act, beginning in 4th line). An unlimited number of officers might have been specified for continuation on the active list by the Secretary for the first board, after which the number specified must have been at least 80 per cent of the officers in a particular category. The Act further provided that

> "* * * if the Secretary approves the report of a board, he shall, not later than the first day of the seventh month beginning after he approves that report, retire each officer who is considered but not recommended for continuation."

Also, the statement in the opinion of the Court below to the effect that the Act applied to officers "who had been considered for promotion twice" but not recommended, is incorrect. The Act provided that it related to officers "who have been considered more than twice." (Last two lines of Par. (a) of Sec. 10). "More than twice" means at least three times and not twice, as stated in the Court's opinion.

Plaintiffs filed a motion for a new trial and reassignment of their cases to a different judge on May 16, 1968, in which they carefully pointed out the erroneous portions of the Court's opinion, but the Court denied that motion without comment. The Court's decision, therefore, constitutes a radical departure from the usual course of judicial proceedings. Practically all courts are meticulous and careful to avoid inaccuracies and misstatements of fact and law in their opinions. An inaccurate opinion under-

mines the respect for and confidence in the court which both lawyers and litigants usually have for judicial decisions. Furthermore, the glaring inaccuracies mentioned above indicate a careless and superficial examination and reading of the statute involved.

In addition to the erroneous statements mentioned above, the Court's opinion, in the last paragraph on page 3, contains the statement that "responsible officials of the Air Force became concerned as to the quality of service of some of these senior officers", etc.

There is absolutely no evidence in the record in these cases that any "responsible" or other "officials of the Air Force" or any other component of the Armed Services of the United States became concerned as to the quality of the service of any of the six plaintiffs in these proceedings. On the contrary, each was, as already stated, rated as "A Very Fine Officer of Great Value to the Service" and in a number of instances as "Outstanding". Therefore, the statements quoted above have no proper place in the opinion of the Court below, and constitute an unjust, unsupported reflection upon sincere, upright, competent and efficient officers of high calibre, who served with distinction in peace and war. The Court below, therefore departed from the truth, contrary to the usual course of judicial proceedings.

Again on page 5 of the Court's opinion there are quotations from the 1957 report of the Cordiner Committee on Professional and Technical Compensation, including the following:

> "* * * Having failed of selection for promotion and being in the sanctuary of this provision, these officers have not continued to produce with customary effectiveness. * * *" (about middle of page).

Those words have absolutely no application to plaintiffs. On the contrary, the only evidence before the Court below conclusively shows that all of the plaintiffs con-

tinued to perform their duties up to the very hour of their mandatory retirements in a manner entirely satisfactory to the superior officers under whom they served, as well as their contemporaries. In this respect the Court's opinion again departs from the usual course of judicial proceedings. The portions of the opinion quoted above improperly and unjustly reflect upon the plaintiffs and should be deleted therefrom.

Furthermore, at page 7 of the opinion of the Court below are found inaccuracies believed to call for the exercise of the supervisory powers of this Court. There the case of Charles L. Andrews et al. v. United States, 175 Ct. Cls. 561 (1966) is cited as an applicable precedent in these proceedings. That case is not an applicable or persuasive precedent in the cases involved here. In that case, the plaintiffs had served the full period of time required by the Uniform Pay Act of 1963. In the present cases, plaintiffs' statutory periods of service were cut short by their mandatory retirements, they were deprived summarily of the right to serve the periods fixed by the applicable statutes, and their rates of retired pay were materially reduced thereby.

Certiorari should be granted by this Court and the Court below should be directed to eliminate from its opinion all reflections upon the character of the service of plaintiffs.

5. Does Temporary Statute Repeal or Suspend Permanent Statutes?

This seems to be a novel question. The situation in these cases suggests the query whether Section 10 of the Act of July 12, 1960, which had a life of five years and expired July 12, 1965, by implication, repealed or suspended Sections 8916(a) and 8921(a) of Title 10, United States Code, permanent statutory provisions which have been in effect for 20 years. (Act of August 7, 1947, 61 Stat. 605). Section 10 contains no language even sug-

gesting that a repeal or suspension of the provisions of Sections 8916(a) and 8921(a) of Title 10 was intended. Construing all three statutory provisions together and giving effect to all seems to be impossible. Therefore, the permanent statutory provisions should prevail.

Repeals by implication are not favored in the law.

> State ex rel Lum v. Archibald, 43 Minn. 328, 45 N. W. 606, (1890).

Section 10 of the Act of July 12, 1960, seems to have had no actual force and effect, and that plaintiffs' retirements thereunder are wholly void.

6. Unlawful Delegation of Legislative Discretion.

Article I, Section 8, of the Constitution of the United States provides that all legislative powers granted are vested in the Congress, and that the Congress shall have power "To make Rules for the Government and Regulation of the land and naval Forces." No other agency, department or officer has any authority or power to increase, reduce or otherwise affect the strength of the military forces of the United States unless empowered by appropriate Congressional legislation to do so.

In enacting Section 10 of the Act of July 12, 1960, the Congress, as heretofore pointed out, did not prescribe any standards for the selection of the officers to be retained on the active list or those to be retired mandatorily, and did not authorize the Secretary of the Air Force to delegate to anyone else the legislative discretion conferred upon him by said Act to reduce the strength of the Air Force by mandatorily retiring commissioned officers. The Act specifically and definitely provides that

> "(a) * * * the * * * Secretary of the Air Force may convene one or more boards * * * to review the records of, and recommend for continuation on the active list, officers of that component * * *.

"(b) A board convened under this section shall recommend officers for continuation on the active list in the number specified by the Secretary * * *.

"(c) * * * if the Secretary approves the report of a board, he shall * * * retire each officer who is considered but not recommended for continuation."

Notwithstanding the fact that the statute limited the power and authority to convene selection boards and to specify the number of officers to be continued on the active list to the Secretary of the Air Force, and did not authorize him to delegate either of those powers to others, the selection board which considered plaintiffs' cases was appointed by the Assistant Vice Chief of Staff of the Air Force. The order of the Air Force appointing a "Screening Board", the board "to review the records" of officers, despite the statement therein that "the law requires that the Secretary of the Air Force specify the exact number to be continued on active duty", directed that "The Letter of Instructions to the Central Board will, * * * delegate to the Deputy Chief of Staff, Personnel, authority to specify for the Secretary of the Air Force the exact number in each group to be continued on active duty * * *". The order appointing the selection board directed that "Within the percentages specified above, the Deputy Chief of Staff, Personnel, shall establish for the Secretary of the Air Force * * * the exact number of officers in each grade to be selected for continuation on the active list * * *". Since the statute did not confer the power on the Secretary to delegate his discretionary authority and power mentioned above, it would follow, as a matter of course, that all acts performed under delegated powers are void, and plaintiffs' retirements likewise are void.

In the case of Cudahy Packing Co. v. Holland, Administrator of the Wage and Hour Division, Department of Labor, 315 U. S. 357, 363, 367; 86 L. Ed. 895, 899, 901, 902 (1942), this Court had before it for consideration "the narrow but important question as to the power of

the Administrator to delegate his power to issue a subpoena." In deciding that question, this Court, among other things, said

> "The Act does not define the Administrator's power to issue subpoenaes or specifically authorize him to delegate it to others * * *
>
> "Unlimited authority of an administrative officer to delegate the exercise of the subpoena power is not lightly to be inferred:"

This Court held that a subpoena duces tecum signed by a person other than the Administrator was void.

No logic is required to determine which is the more important, the issuance of a subpoena for the appearance of a witness before an administrative body making an investigation and directing the witness to bring along some documentary evidence, or an exercise of the discretionary determination of how many military officers shall have their careers in the armed forces abruptly ended and their financial affairs disrupted, officers who served their country honorably, faithfully and efficiently in war and peace for more than 20 years and who could not be promoted because of lack of vacancies. The mere statement of the question prompts the answer. The determinations made under attempted delegations, we contend, are void and the retirements of plaintiffs likewise are void.

CONCLUSION

Since the judgment of the United States Court of Claims relates to and purports to decide questions of law not previously considered and decided by any court; since the Court below departed from the usual course of judicial proceedings; since plaintiffs were prematurely and mandatorily retired under and as a result of unlawful delegations of Congressional discretion; and since the

decision below is defective for the other reasons stated herein, this petition for writ of certiorari should be granted.

Respectfully submitted

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